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No. 07-482

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In The Supreme Court of the United States

THE STATE OF TEXAS,

Petitioner,

v.

GERALDINE H. SOILEAU,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

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REPLY BRIEF

Pursuant to Rule 15(5) and (6) of Supreme Court Rules, the State of Texas ("State") files this Reply Brief.

In Geraldine Soileau's ("Soileau") Brief in Opposition, page 12, she states, "At bottom, a bail-bond forfeiture obligation is a unique type of debt – the *obligation* is civil and contractual, but the *proceeding* in which it is enforced is criminal because the contract is related to a criminal defendant. *Reyes v. State*, 31 S.W.3d 343, 345 (Tex.App. 2000)." This statement is inaccurate and misleading. Soileau is citing to *Reyes*, an intermediate court of appeals decision out of Corpus Christi, which is not the law in Texas. (One might say that it could be the law in the Corpus Christi Court of Appeals jurisdiction if there was no authority to the contrary out of the Court of Criminal Appeals, but in this situation there is authority to the contrary out of the Court of Criminal Appeals). The highest Texas criminal court is the Court of Criminal Appeals. In 1914 the Court of Criminal Appeals in *General Bonding & Casualty Insurance Co. v. State*, 73 Tex.Crim. 649, 165 S.W. 615, 617 (1914) held that while a bond forfeiture action " . . . is not directly to punish the offender . . . it partakes of punishment for an offense against the state, and **is not in the nature of a violation of a contract**." (Emphasis added). Furthermore the Court of Criminal Appeals in *State v. Sellers*, 790 S.W.2d 316, 321 (Tex.Crim.App. 1990) stated,

> . . . **a bond forfeiture proceeding is not a "civil case,"** Article 22.10 supra, notwithstanding. The Supreme Court of Texas long ago noted, in responding negatively to the certified question whether courts of civil appeals had jurisdiction to entertain appeals in bond forfeiture proceedings, that "[t]he effect of this provision [a forerunner of Article 22.10] was to prescribe the manner of trial, **but did not change the character of the case**." *Jeter v. State*, 86 Tex. 555, 26 S.W. 49 (1894). The Supreme Court, the Court of Appeals, and its successor, this Court, have all consistently held that bond forfeiture is a criminal matter. (Citations omitted). Article 22.10, supra simply prescribes that civil rules shall govern all proceedings in the trial court following judgment nisi. **It does not transform a bond forfeiture proceeding from a criminal into "a civil case"** for purposes of § 51.012, supra. (Emphasis added).

The State in *Sellers* was attempting to appeal an adverse decision in a bond forfeiture case relying on TEX.CODE CRIM.PROC.ANN. art. 22.10, which provides that the proceedings in a bond forfeiture case shall be governed by the same rules governing civil suits. The State wanted to apply § 51.012 of the Civil Practice and Remedies Code, which provides that, "**In a civil case** in which the judgment or amount in controversy exceeds $100, exclusive of interest and costs, a person may take an appeal or writ or error to the court of appeals from a final judgment of the district or county court." (Emphasis added). The Court in *Sellers*

is very clear that a bond forfeiture proceeding is a criminal case and not a civil case; and as such, the State was not and is not entitled to appeal bond forfeiture cases.

Application of both *General Bonding & Casualty Insurance Co.* and *Sellers* results in the following correct statement in Texas: a bail bond forfeiture obligation is a unique type of debt – the obligation is criminal and is not in the nature of a violation of a contract and the civil rules govern all proceedings in the trial court following the judgment nisi. Soileau, throughout her brief, has confused and misstated the nature of bond forfeiture judgments in Texas. By misconstruing the nature of bond forfeiture judgments in Texas, Soileau is sending the Court down a wrong path. Again, Texas law holds that (1) a bond forfeiture obligation is criminal in nature, (2) a bond forfeiture obligation is **not** in the nature of a violation of contract (i.e., any written agreement remains between the surety and the principal, and not with the State) and (3) in a bond forfeiture case, civil rules govern all proceedings.

Soileau on page 12 of her Brief in Opposition states, "As Texas courts have recognized, a bail bond is a contract between the surety and the State." Soileau cites to *Reyes*, *Morin v. State*, 770 S.W.2d 599, 599 (Tex.App. 1989); *Keith v. State*, 760 S.W.2d 746, 747 (Tex.App. 1988), *aff'd*, 802 S.W.2d 690 (Tex.Crim.App. 1990) (bail bond 'is a contract between Keith, as a surety, and the State'); *Marshall v. State*, 797 S.W.2d 698, 702 (Tex.App. 1990). Critically

important here is that the statement in each of these cases that "a bail bond is a contract between the surety and the State" is dicta. The Court of Criminal Appeals in *Keith*, 802 S.W.2d at 691, states "Recently, we held that Art. 22.16(c)(2) violates the separation of powers provision in Art. II, § 1 of the Texas Constitution. (Citation omitted). Because we declared the contested portion of the statute unconstitutional, the question of whether it was to be applied prospectively or retroactively is now moot." The Court of Criminal Appeals states in footnote 1, at 690, that "We express no opinion on the Court of Appeals' holding that the State had secured vested rights in entering into the bail contract and that the amendment was substantive, not procedural." Accordingly, the Court of Criminal Appeals has **never** held that a bail bond is a contract between the surety and the State.

Since the Court of Criminal Appeals has never held that a bond is a contract between a surety and the State, it then becomes an issue as to which of the intermediate court of appeals' decisions applies to Soileau. Soileau was a Harris County surety and is a Harris County resident and Harris County is in the Court of Appeals for the First and Fourteenth Districts of Texas. Thus a decision out of the First District Court of Appeals is the law that is binding and would be applied to Soileau. The First District Court of Appeals in *Kubosh v. State*, 177 S.W.3d 156, 160 (Tex.App. – Houston [1st Dist.] 2005, pet. refused), at footnote 4 held, "We disagree with Kubosh's contention that the State is a party to the bail-bond contract."

The recent 2005 *Kubosh* court further states in footnote 4 that:

> The bond is "a written undertaking entered into by the defendant and his sureties . . . " Tex.Code Crim.Proc.Ann. art. 17.02 (Vernon 1977); *Rodriguez v. State*, 673 S.W.2d 635, 640 (Tex.App. – San Antonio 1984, no writ). The sureties agree to assume the bond obligation in return for consideration, usually a fee, paid by the principal. *Rodriguez*, 673 S.W.2d at 640. The State does not release the principal because of contractual consideration between the State and the surety, but because of constitutional and statutory rights of the principal. *Id.*; Tex. Const. Art. I, § 11; Tex.Code Crim.Proc.Ann. art. 1.07 (Vernon 1977).

See also TEX.CODE CRIM.PROC.ANN. art. 17.29(a) which provides, "When the accused has given the required bond, either to the magistrate or the officer having him in custody, he shall at once be set at liberty." In the final analysis, a bail bond is **not** a contract between the surety and the State. Rather, and as set forth above in *Kubosh*, a bail bond is "a written undertaking entered into by the defendant and his sureties."

On page 15 of Soileau's Brief in Opposition, she states that the nature of Soileau's obligation is plainly a civil obligation and that bond forfeiture proceedings being criminal refer to the general jurisdiction of the court that enforces it. Soileau is mistaken. The *Sellers* decision is **not** a decision

concerning "jurisdiction" as Soileau suggests. Rather it is a decision stating that the "character of a bond forfeiture case" is a criminal case and not a civil case. Soileau's statement on page 15 of her Brief in Opposition that, "Because the decisions that Texas cites characterize the jurisdiction of the enforcing court, rather than the nature of the obligation itself, these cases provide no real authority that Soileau's debt is criminal in nature," is simply wrong and is a misstatement of Texas law. As set forth above, both the *Sellers* decision and *General Bonding & Casualty Insurance Co.* make it clear that in Texas a bond forfeiture obligation is criminal in nature and is not in the nature of a violation of a contract. Accordingly, Soileau is incorrect in stating that the bond forfeiture obligation is a civil debt; and as such, Soileau is further mistaken in stating that it is qualitatively indistinguishable from the civil student-loan debt at issue in *Tennessee Student Assistant Corp. v. Hood*, 541 U.S. 440 (2004).

Soileau at pages 17 and 18 of her Brief in Opposition, sets forth that the State asserted that the discharge of bail-bond forfeiture judgments in bankruptcy would devastate its criminal justice system and that the State asserted that its criminal justice system faces ruin. Such statements are untrue and are a gross exaggeration by Soileau designed to prejudice the State's Petition for Certiorari. Such conduct by Soileau has no place in appellate advocacy. Rather the State asserted on page 14 of its Petition for a Writ of Certiorari, "Allowing the bankruptcy

court to discharge these bond forfeiture judgments interferes with the State's right to administer its criminal justice system." This position statement by the State clearly is **not** an assertion that discharges in bankruptcy would devastate its criminal justice system or that the State of Texas criminal justice system faces ruin.

It is evident from statements made by Soileau on pages 17 through 20 of her Brief in Opposition that she does not understand the nature of the criminal justice system in Texas. The court in *Hickman v. Texas*, 260 F.3d 400, 406 (5th Cir. 2001), distinctly acknowledges that, " . . . the bail bond is an integral and essential tool in the administration of the State's criminal justice system." The State's criminal justice system extends beyond the concept of financial responsibility to satisfy a bond forfeiture judgment that a surety owes when a principal fails to appear and the surety has a bond forfeiture judgment entered against her. The criminal justice system (1) extends to the requirement that the surety has a duty to return a principal to custody and (2) acts as a deterrent to other sureties to be responsible for the principals that they have bonded out. It is imperative for all sureties to understand that they cannot shed their duty and responsibilities by simply filing bankruptcy to avoid payment of the bond forfeiture judgments, since all sureties have a responsibility and duty to locate absent defendants and bring them back to custody in order to protect innocent victims of crime. In *Gibson v. State*, 401 S.W.2d 822, 825 (Tex.Crim.App.

1967) the court referenced the duties of a surety stating, "The realization that their bond will be forfeited in the event the principal fails to appear . . . should not lessen the ardor with which the surety pursues the principal who fails to appear for his trial." Likewise this criminal justice system concept is implied in *Dobrek v. Phelan*, 419 F.3d 259, 264-65 (3rd Cir. 2005) wherein the *Dobrek* court states that a surety has a duty to produce defendants in court and "should the bail bond debts of a commercial bondsman be dischargeable in bankruptcy, the state's criminal proceedings may effectively be invalidated, triggering comity and federalism concerns."

On page 20 of Soileau's Brief in Opposition, she references that "a primary purpose of bankruptcy law is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'" (Citation omitted). This Court in *Grogan v. Garner,* 498 U.S. 279, 287 (1991) sets forth that 11 U.S.C. § 523(a) overrides the fresh start purpose of bankruptcy by stating, "Congress evidently concluded that the creditors' interest in recovering full payment of debts in these categories [encompassed by § 523(a)] **outweighed** the debtors' interest in a complete fresh start." (Emphasis added). Therefore by qualifying under § 523(a)(7) bond forfeiture judgments override the "fresh start" purpose of bankruptcy.

On page 23 of Soileau's Brief in Opposition she states that, "Texas suggests that the decision below is

contrary to *Kelly v. Robinson*, 479 U.S. 36 (1986). Pet. 12, 15." The State does not say that on either pages 12 or 15 of its Petition before this Court. Again, Soileau is in error. The State, however, agrees that the majority opinion in the Fifth Circuit Court case being appealed here does defend the *Hickman* decision. Further the State also agrees that *Hickman* misinterpreted *Kelly* to arrive at its decision to discharge bond forfeiture judgments in bankruptcy. The State's position in this regard mirrors the decision in *Dobrek*, 419 F.3d at 266-67, since Dobrek held that "forfeitures" are within the plain meaning of § 523(a)(7) and that its holding is consistent with *Kelly*. *Dobrek* goes on to state that *Hickman's* decision that § 523(a)(7) contemplated only those fines or obligations imposed because of misconduct or wrongdoing by the debtor was based on *Hickman's* misinterpretation of *Kelly*. *Dobrek* states that the Third Circuit has expressly rejected *Hickman's* interpretation of *Kelly*. The State believes that *Dobrek's* interpretation of *Kelly* is the correct interpretation and that bond forfeiture judgments are not dischargeable in bankruptcy.

On pages 25-29 of Soileau's Brief in Opposition, she states that the State has waived any argument concerning § 523(a)(7). The State disagrees. The State explained on page 7 of its Petition that it was prevented from directly challenging *Hickman* based on the rule in the Fifth Circuit Court that one panel of the Fifth Circuit cannot overrule a former panel decision of the Fifth Circuit. This ruling by the Fifth

Circuit is what necessitated the State's challenge on the grounds of sovereign immunity instead. The State, however, always contended that *Hickman* was wrongly decided and that § 523(a)(7) should include bond forfeiture judgments. Chief Judge Jones' concurring opinion, Pet. App. 24, states, "The State has **consistently argued**, however, and I agree that *Hickman* was wrongly decided." (Emphasis added). At oral arguments before the Fifth Circuit Court, there was substantial argument concerning whether *Hickman* was correctly decided. There is no question but that the State raised and argued before the Fifth Circuit Court the issue concerning whether *Hickman* was correctly decided. There also is no question but that the Fifth Circuit Court majority considered this issue and even states, Pet. App. 19, " . . . we agree with *Hickman's* interpretation of § 523(a)(7) as excepting from discharge only those debts incurred as a result of misconduct or wrongdoing."

While Soileau contends that the discussion by the majority concerning *Hickman* is dicta, this does not appear to be accurate. Noteworthy is that the Fifth Circuit Court decision consists of 29 pages in totality; and yet, over 17 pages of the Fifth Circuit's decision is spent discussing whether *Hickman* was correctly decided. Chief Judge Jones' concurring opinion states that *Hickman* was incorrectly decided and the majority considered it important to respond to the concurring opinion. The State submits that the substantial discussion by the majority along with the concurring opinion concerning *Hickman* is not just dicta. Rather

such substantial discussion by the Fifth Circuit resulted in the majority deciding that *Hickman* was correct and did not need to be reconsidered.

Accordingly, the State submits that certiorari review is proper to determine whether bond forfeiture judgments are dischargeable in bankruptcy court since there is a circuit court split on this issue. The Third Circuit Court decisions in both *Dobrek*, 419 F.3d 259 (3rd Cir. 2005) and *City of Philadelphia v. Gi Nam (In re Gi Nam)*, 273 F.3d 281 (3d Cir. 2001) hold that bond forfeiture judgments are not dischargeable in bankruptcy while the Fourth Circuit Court in *Virginia v. Collins (In re Collins)*, 172 F.3d 924 (4th Cir. 1999) and the Fifth Circuit Court in *Hickman v. Texas*, 260 F.3d 400 (5th Cir. 2001) hold that bond forfeiture judgments are dischargeable in bankruptcy. The State submits that the question as to whether bond forfeiture judgments are dischargeable in bankruptcy is an important federal question concerning all states. The State believes that this Court should resolve this conflict between the Circuit Courts of Appeals.

The State further believes that certiorari is proper to review the decision by the Fifth Circuit Court concerning the sovereign immunity issue. The State submits that the decisions in *Tennessee Student Assistant Corp. v. Hood*, 541 U.S. 440 (2004) and *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) provide authority which allows the State to prevail on its sovereign immunity issue since the bankruptcy court's *in rem* jurisdiction

offends traditional state sovereignty over the State's criminal justice system. As Chief Judge Jones stated in her concurring opinion, Pet. App. 23, footnote 48, "Thus, it could be argued that the mere fact that this case concerns an *in rem* proceeding in bankruptcy does not end this court's analysis if the bankruptcy court's exercise of *in rem* jurisdiction offends traditional state sovereignty over its criminal justice system." In addition, Chief Judge Jones stated, Pet. App. 28, "Informed by *Kelly*, I would hold that a bankruptcy court may not utilize its *in rem* jurisdiction to ride rough-shod over this traditional bastion of state sovereignty . . . " The State's position parallels the concurring opinion since bond forfeiture judgments in Texas are criminal in nature and the bankruptcy court's *in rem* jurisdiction discharging Soileau's bond forfeiture judgments offends the State's criminal justice system.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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